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No. 317

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

ESTATE OF JOSEPH F. DECASTRO, Deceased
KINGS COUNTY TRUST COMPANY, Executor,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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KINGS COUNTY TRUST COMPANY, Executor,
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v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Kings County Trust Company, executor of the will of Joseph F. deCastro, late of Brooklyn, New York, prays that a writ of certiorari may issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered April 22, 1946 in the case between the above-named parties. Said judgment affirmed a decision of The Tax Court of the United States which denied a deduction for gifts to charity in computing estate taxes under the Internal Revenue Code.

Jurisdiction.

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended.

Opinion Below.

The memorandum opinion of the Tax Court is printed in the Record, pp. 23-26. The opinion of the Circuit Court of Appeals is printed in the Record, pp. 36-42.

Statute Involved.

The statute involved is section 812(d) of the Internal Revenue Code. The relevant part of the statute is set out in the appendix (*infra*, p. 13).

Summary Statement.

In computing the Federal estate tax are the valuation and deduction from the gross estate of charitable bequests of remainder interests under testamentary trusts precluded because the will confers upon the trustee the power to invade principal if due to illness, accident or other unforeseen emergency the income of the trust shall not be sufficient to amply provide for the beneficiary's needs?

The Facts.

Joseph F. deCastro died on November 2, 1941. His will provided for a division of his residuary estate into two equal parts, one of which was to be held in trust for the benefit of his wife for life and after her death for the benefit of her nephew for life. Upon the death of the survivor

the trust was to terminate and 90 percent of the principal was to be paid to certain named charitable, educational and religious organizations. The remaining 10 percent was to go to a named individual if then living, and if not, the whole remainder was to go to the charities named (R. 31-32).

The remaining one-half of the residuary estate was to be held in trust for the benefit of the wife for life and after her death for the benefit of her niece for life. This trust was to terminate upon the death of the survivor and the principal was to be paid to the named charities (R. 22).

The Third Article of the will contained the following provision:

> "Notwithstanding any of the provisions hereinbefore made, if, during the life of my wife, FANNIE DECASTRO, due to her illness, accident or other unforeseen emergency, the income of the two (2) trusts shall not be sufficient to amply provide for her needs, then and in that event I authorize and absolutely direct my Trustee to apply from the principal of the two (2) trusts, in equal proportions, such sum or sums as, in the sole discretion of my Trustee, will amply provide for her needs. I especially direct that no one shall have the right to call in question the propriety or the amount so applied for my wife. Upon the death of my wife I direct that my Trustee shall pay her funeral expenses and charge them against the two trusts, in equal proportions" (R. 22).

At the date of testator's death his wife was 75 years of age. The net income of the two trusts for the year 1942 was $4,415.29, for 1943 it was $4,757.33 and for 1944 it was $4,700.60 (R. 23).

At the time of the trial in the Tax Court in 1945, decedent's wife was 78 years of age and no "sickness, accident

or other emergency'' had occurred. The testator's wife had then accumulated several hundreds of dollars out of the income of the trusts which had been distributed to her. Taking into consideration a cash bequest of $2,500, received under decedent's will, she had on hand in February, 1945, about $1,250 in United States bonds, $1,000 in a savings bank, and about the same amount in a checking account. In addition there was also approximately $1,700 of undistributed income in the trusts (R. 23).

A deduction was claimed in the estate tax return of $31,960 on account of the bequests to charity. The Commissioner disallowed the deduction.

The Tax Court upheld the action of the Commissioner on the authority of *Merchants National Bank* v. *Commissioner,* 320 U. S. 256, although admitting that the conditions under which the corpora of the trusts could be invaded were somewhat more restricted than those in the *Merchants National Bank* case, *supra* (R. 22).

The Circuit Court of Appeals for the Second Circuit affirmed the decision of the Tax Court, also relying on the *Merchants National Bank* v. *Commissioner, supra.*[1]

Questions Presented.

1. Did this Court in *Merchants National Bank of Boston v. Commissioner,* 320 U. S. 256, overrule *Ithaca Trust Company* v. *United States,* 279 U. S. 151, *sub silentio* as suggested by the Circuit Court of Appeals?

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[1] However, Frank, Circuit Judge, in the opinion, indicated that there was a question whether or not the Supreme Court in the *Merchants National Bank* case in purporting to distinguish the *Ithaca Trust Company* v. *United States,* 279 U. S. 151, had in so doing so narrowed its scope as virtually to overrule it *sub silentio* (R. 36).

2. Did the Circuit Court of Appeals err in affirming the decision of the Tax Court by holding that the decision of this Court in *Merchants National Bank of Boston* v. *Commissioner*, 320 U. S. 256, was controlling?

3. Did the Circuit Court of Appeals err in holding that a trust instrument which permits the invasion of principal only in the event of illness, accident or other unforeseen emergency creates the same degree of improbability regarding the ultimate vesting of charitable bequests as the trust provision considered in the *Merchants National Bank* case which introduced the element of the beneficiary's "happiness" which this Court said brought into the calculation elements of speculation too large to be overcome?

Reasons Relied Upon for Granting of Writ.

The decision of the Circuit Court in this case is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Commissioner* v. *Bank of America*, 133 Fed. (2d) 753, which was rendered prior to the decision of this Court in the *Merchants National Bank of Boston* case, *supra*, as well as the decision of the Circuit Court of Appeals for the Fourth Circuit in *Commissioner* v. *Robertson*, 141 Fed. (2d) 855, and the decision of the Ninth Circuit in *Commissioner* v. *Wells Fargo Bank & Union Trust Co.*, 145 Fed. (2d) 130, both of which were decided after the decision of this Court in the *Merchants National Bank of Boston* case, *supra*.

The Circuit Court of Appeals extends the rule laid down in the *Merchants National Bank* case, *supra*, beyond its reasonable limits and thus disregards the rule established in the *Ithaca Trust Company* case, *supra*, as well as a long line of cases in which that decision was relied upon and

followed.[2] In fact the *Ithaca Trust Company* case is still being followed by The Tax Court of the United States.[3]

The question presented is of great importance in the administration of the Federal Estate Tax Law. The decision of this Court in the *Merchants National Bank* case, *supra,* has caused confusion and as indicated by the decision of the Circuit Court of Appeals it has caused some speculation as to its possible effect upon the future application of the principles announced in the *Ithaca Trust Company* case, *supra.*

Summary of Argument.

The Circuit Court of Appeals erred in its holding that this case is controlled by the decision of this Court in the *Merchants National Bank* case, *supra.* The trustee's power to invade the *corpora* of the trusts in the case of "illness, accident or other unforeseen emergency" is in no sense of truth the same as the power to invade for the purpose of providing "happiness" due to the fancy, whim or desire of the life beneficiary, as was the case in the *Merchants National Bank* case, *supra.*

A power to invade principal in the event of "illness, accident or other unforeseen emergency" introduces no element of speculation appreciably greater than the general uncertainty that attends human affairs, which this Court thought to be a fair measuring stick in the *Ithaca Trust Company* case, *supra.*

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[2] *Hartford Connecticut Trust Co.* v. *Eaton,* 39 Fed. (2d) 710 (C. C. A. 2); *Lucas* v. *Mercantile Trust Co.,* 42 Fed. (2d) 39 (C. C. A. 8); *Benjamin B. Saunders, Ex.,* 18 B. T. A. 222; *Michigan Trust Co., et al.,* 27 B. T. A. 556; *E. H. Hallett, et al.,* 29 B. T. A. 497; and *Herron* v. *Heiner,* 24 Fed. (2d) 748.

[3] *Estate of Edwin A. Jack,* 6 T. C. 241; *Estate of James M. Schoomaker, Jr.,* 6 T. C. 404; and *Estate of Lucius H. Elmer,* 6 T. C. 121.

ARGUMENT.

POINT I.

The Circuit Court of Appeals erroneously held that the decision of this Court in Merchants National Bank v. Commissioner, 320 U. S. 256, controlled the decision in this case.

In the *Merchants National Bank* case, *supra*, the language of the trust instrument, insofar as material, was the following:

> "at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife, May L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust."

Mr. Justice Rutledge delivered the opinion of the court, and he postulated the question for decision in the following language:

> "The case, at least under §303(a)(3), turns on whether the bequests to the charities have, as of the testator's death, a "presently ascertainable" value or, put another way, on whether, as of that time, the extent to which the widow would divert the corpus from the charities could be measured accurately."

After alluding to the statute and the Treasury regulations he said:

> "• • • to the extent that there is a power in a private donee or trustee to divert the property from the charity, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

Further on in the opinion he says:

> "Under this will the extent to which the principal might be used was not restricted by a fixed standard based on the widow's prior way of life. Compare *Ithaca Trust Co.* v. *United States,* 279 U. S. 151. Here, for example, her 'happiness' was among the factors to be considered by the trustee."

The importance and weight of the "happiness" language as the basis for the decision reached, is expressed in the following language employed by Mr. Justice Rutledge:

> "Introducing the element of the widow's happiness, and instructing the trustee to exercise its discretion with liberality to make her wishes prior to the claims of residuary beneficiaries brought into the calculation elements of speculation too large to be overcome. • • •"

It is difficult to suggest any similarity between the situation presented in the *Merchants National Bank* case, *supra,* and that postulated in the instant case. Certainly there was no power lodged in the widow in the instant case, by any voluntary act on her part, to divert any part of corpus from the charities, as Mr. Justice Rutledge stated the question to be in the *Merchants National Bank* case. Here the diversion could occur only in the event of "illness, accident or other unforeseen emergency."

POINT II.

Where the power to invade is limited to instances of illness, accident or other unforeseen emergency, the element of uncertainty, as to the payment of the charitable bequest, is no greater than the general uncertainty that attends human affairs.

In *Commissioner* v. *Bank of America National Trust and Savings Association, Executor,* 133 Fed. (2d) 753 (C. C. A. 9) the trustee was directed to pay a fixed amount each month to decedent's sister "and in case she should, by reason of accident, illness, or other unusual circumstances so require, such additional sum or sums as in the judgment of said trustee be necessary and reasonable under the existing case." There is no substantial difference between this language and that involved in the instant case. In other respects the factual situation closely resembles that present in the case at bar. The beneficiary there had lived within the allotted income and there, as here, income had been accumulated. The court pointed out that "nothing was left to the sister's discretion". The court held that the deduction was allowable.

Wells Fargo Bank & Union Trust Co., Executor v. *Commissioner,* 145 Fed. (2d) 132, is another decision by the United States Circuit Court of Appeals for the Ninth Circuit. Here the income was payable to the decedent's sister during her life and the trustee was authorized to use the principal, up to ten percent of its value each year, in the event of sickness, accident, want, or other emergency of the sister. In this case the corpus was in fact invaded. The Circuit Court of Appeals reversed the decision of the Tax Court and allowed the deduction, and in so doing said in part:

> "The Tax Court was wrong when it permitted evidence of such actual invasion to influence its decision."

In reversing the Tax Court, the Circuit Court cited its decision, rendered on the same day in *Commissioner* v. *Wells Fargo Bank & Union Trust Co., Executor,* 145 Fed. (2d) 130, which affirmed a decision of the Tax Court in which the language of the trust instrument permitted the invasion when necessary to assist in the care of the beneficiaries' needs "on account of any sickness, accident, want or other emergency".

In *Estate of Horace G. Wetherill* v. *Commissioner,* 4 T. C. 678, the deduction was allowed by the Tax Court. The language of the trust there involved was the following:

> "In the event Trustor's said wife is or becomes incapacitated after the death of said Trustor, the Trustee shall pay said net income and any part, or all, of the principal of said trust fund for her care, maintenance, and support. Said Trustee shall also pay out of said principal of said trust fund for any extraordinary expenses caused by an emergency created by her injury, illness, or disability, provided Trustor's said wife states to Trustee that she had insufficient funds to provide for such extraordinary expenses."

The Commissioner appealed from the Tax Court's decision to the United States Circuit Court of Appeals for the Ninth Circuit, but the appeal was dismissed upon the Commissioner's motion, 150 Fed (2d) 1019 (September 5, 1945).

The factual situation in the instant case is as strong, and in some respects stronger than that existing in the above decisions of the Circuit Court of Appeals for the Ninth Circuit. Mrs. deCastro was 75 years of age at the

date of the decedent's death and 78 at the time of the trial before the Tax Court, she enjoyed good health, her habits of life were conservative, she was thrifty and had lived well within the income of the trust which had been distributed to her. In fact she had accumulated $1,250 in United States bonds, $1,000 in a savings account, about the same amount in a checking account and in addition the trustee had in its hands approximately $1,700 of undistributed trust income.

Mrs. deCastro could not by any voluntary act on her part compel the trustee to disburse any part of the principal of the trusts in question. The trustee could not invade principal except in the case of illness, accident or other unforeseen emergency. The certainty or uncertainty regarding the occurrence of such events was not, it is submitted, any greater than the general uncertainty that attends human affairs, and such an uncertainty, the Supreme Court held, in the *Ithaca Trust Company* case, *supra,* was not sufficient to defeat the deduction for the charitable purpose.

POINT III.

There is a conflict in the Circuit Courts of Appeal on the question involved.

There appears to be a clear conflict between the decision of the Circuit Court of Appeals for the Second Circuit in the instant case and the above decisions of the Circuit Court of Appeals for the Ninth Circuit as well as the decision of the Circuit Court of Appeals for the Fourth Circuit in *Commissioner* v. *Robertson Estate,* 141 Fed. (2d) 855. It is also difficult to reconcile the Commissioner's attitude

in the instant case with his actions in the *Wetherill* case, 4 T. C. 678, in which he dismissed his appeal, 150 Fed. (2d) 1019 (C. C. A. 9).

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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Appendix.

Section 812(d)—Internal Revenue Code:

"For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate * * * (d) Transfers for Public, Charitable and Religious Uses. The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated or exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, or to a trustee or trustees, or a fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals * * *"

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ESTATE OF JOSEPH F. DE CASTRO, DECEASED, KINGS COUNTY TRUST COMPANY, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 21–26) are not reported. The opinion of the Circuit Court of Appeals (R. 36–41) is reported at 155 F. 2d 254.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 22, 1946. (R. 42.) The petition for a writ of certiorari was filed on July 19, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether charitable bequests in remainder of the corpus of testamentary trusts are deductible for estate tax purposes, when the trustee is empowered, in its sole discretion, to invade the corpus "to amply provide" for the needs of the life tenent in the event of illness, accident or unforeseen emergency.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 812. NET ESTATE.
>
> For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—
>
> * * * * *
>
> (d) *Transfers for Public, Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the

activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, or to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. * * *

(26 U. S. C. 812.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.44. *Transfers for public, charitable, religious, etc., uses.* * * *

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * *

* * * * *

SEC. 81.46. *Conditional bequests.*—If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is

vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power. [Italics supplied.]

STATEMENT

The Tax Court found the following facts (R. 21–23):

The petitioner is the executor of the estate of Joseph F. deCastro, who died on November 2, 1941. (R. 21.)

In his will the testator provided for a division of his residuary estate into two equal parts, one of which, referred to as Trust A, was to be held in trust for the benefit of his wife, Fannie deCastro, for life and after her death for the benefit of her nephew, Louis J. Murphy, for life. Upon the death of the survivor of them the trust was to terminate and 90 percent of the then remaining principal was to be paid to certain named

charitable, educational and religious organizations. The remaining 10 percent was to go to a named individual, if living at that time, or, if not, the whole remainder was to go to the charities named. (R. 21–22.)

The other one-half of the residuary estate, referred to as Trust B, was to be held in trust for the benefit of the wife for life and after her death for the benefit of her niece, Irene Murphy, for life. That trust was to terminate upon the death of the survivor of them and the remaining principal was to be paid to certain named charities. (R. 22.)

Article Third of the will contained the following provision for the invasion of the corpora of the trusts (R. 22):

> Notwithstanding any of the provisions hereinbefore made, if, during the life of my wife, Fannie DeCastro, due to her illness, accident or other unforeseen emergency, the income of the two (2) trusts shall not be sufficient to amply provide for her needs, then and in that event I authorize and absolutely direct my Trustee to apply from the principal of the two (2) trusts, in equal proportions, such sum or sums as, in the sole discretion of my Trustee, will amply provide for her needs. I especially direct that no one shall have the right to call in question the propriety or the amount so applied for my wife. Upon the death of my wife I direct that my Trustee

shall pay her funeral expenses and charge them against the two trusts, in equal proportions.

At the date of testator's death his wife was 75 years of age, Louis J. Murphy, her nephew, was 41 years of age, and Irene Murphy, her niece, was 45 years of age. (R. 23.)

The net income of the trusts for the years 1942, 1943 and 1944 was as follows (R. 23):

Year	Trust A	Trust B
1942	$2,208.89	$2,206.40
1943	2,367.33	2,390.40
1944	2,322.28	2,378.32
	6,899.10	6,975.12

Since decedent's death his wife has lived within the income distributed to her by the trustee and has accumulated about $600 of such income. With a cash bequest of $2,500, which she received under decedent's will, she had on hand in February, 1945, about $1,250 in United States bonds, $1,000 in a savings bank, and about the same amount in a checking account. There was also approximately $1,700 of undistributed income in the trusts. She has no other property or income of any substantial amount. (R. 23.)

The combined assets of the trusts had a value of $83,166.74 at the time of decedent's death and a value of $117,354.81 at March 1, 1945. The trust investments consisted principally of mortgages, stocks and bonds. (R. 23.)

Since decedent's death his wife has lived at a hotel where she pays $120 per month for her

room. Her meals cost about $3 a day. She dresses moderately and goes out very little. (R. 23.)

A deduction was claimed in the estate tax return of $31,960 on account of the bequests to charity. The Commissioner disallowed the deduction. (R. 23.)

The Tax Court upheld the Commissioner's determination on the ground that the decision of this Court in the case of *Merchants Bank* v. *Commissioner*, 320 U. S. 256, was determinative. (R. 23–24.) The Court below affirmed the Tax Court's decision. (R. 41.)

ARGUMENT

The court below correctly held that this case is controlled by *Merchants Bank* v. *Commissioner*, 320 U. S. 256, wherein the trustee was authorized to invade the corpus for the "comfort, support, maintenance, and/or happiness" (p. 258) of the testator's widow. This Court there expressly approved the Treasury Regulations[1] which provide that where a trust is created for both charitable and private purposes the charitable bequest, to be deductible, must have, at the testator's death, a value "presently ascertainable, and hence severable from the interest in favor of the private use;" and further, to the extent that there is a power in

[1] Articles 44 and 47 of Treasury Regulations 80 (1934 ed.) were there involved and were substantially the same as Treasury Regulations 105 which are here applicable.

a private donee or trustee to divert the property from the charity "deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

In the present case, the trustee was empowered to invade the trust corpus for such sums as in the trustee's sole discretion would amply provide for the widow's needs if "due to her illness, accident or other unforeseen emergency, the income of the two (2) trusts shall not be sufficient to amply provide for her needs." (R. 22.)

This Court denied the petition for a writ of certiorari in *Industrial Trust Co.* v. *Commissioner,* 151 F. 2d 592 (C. C. A. 1st), on March 11, 1946, No. 781, 1945 Term, which presented the same contentions as are here made.[2] There, as here, the petitioners asserted a conflict with *Commissioner* v. *Robertson's Estate,* 141 F. 2d 855 (C. C. A. 4th), and *Commissioner* v. *Wells Fargo B. & U. Tr. Co.,* 145 F. 2d 130 (C. C. A. 9th). The Fourth and Ninth Circuit Courts of Appeals failed to give effect to the Treasury Regulations and proceeded upon the premise that the issue

[2] In the *Industrial Trust case* (No. 781, October Term, 1945, R. 15), the trustees in their "uncontrolled ' * * discretion" were authorized to pay to the testator's wife so much of the principal as they may deem to be required for any purpose approved by them where the income "shall be insufficient to provide for her comfortable maintenance and support, or to meet the expense of any sickness, emergency or misfortune, or any other expense whether of a like or different kind, deemed by said Trustees to be proper for her comfort or pleasure * * *."

turned not upon the *character* of the power of invasion, but upon the *likelihood* of its exercise.[3] That approach was squarely in conflict with the *Merchants Bank* decision and, as recognized in the Government's brief in opposition in the *Industrial Trust* case (p. 7), those decisions are, to that extent, in conflict with the *Industrial Trust* decision as well as with the decision below. However, since the Tax Court and the court below were so clearly correct in holding that the *Merchant Bank* decision controls this case, there is no warrant for further review by this Court and we oppose the granting of this petition. The petition should be denied here, as it was in the *Industrial Trust* case.

Respectfully submitted.

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[3] It is also true that the Tax Court has recently stated that deductibility of such bequests "depends, generally, upon the language of the power and the likelihood of its exercise as disclosed by the facts and circumstances of each case." *Estate of Jack* v. *Commissioner*, 6 T. C. 241, 244; *Estate of Elmer* v. *Commissioner*, 6 T. C. No. 121.

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